CHONG CHEE YAN

v.

GOLDEN DRAGON GARDEN SDN BHD

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[COMPANIES WINDING-UP NO: 28-53-98]
4 JANUARY 1999

COMPANY LAW: *Winding up - Petition - Striking out - Application to strike out petition under O. 18 r. 19 Rules of the High Court 1980 - Whether incompetent - Whether Rules of the High Court 1980 not applicable to companies winding up petition - Inherent jurisdiction of court - Companies Act 1965, s. 218 - Rules of the High Court 1980, O. 1 r. 2(2), O. 18 r. 19*

COMPANY LAW: *Winding up - Petition - Striking out - Bona fide disputes - Whether there was no neglect to pay - Value of assets - Respondent's assets exceeded liabilities - Whether respondent commercially solvent - Whether petition to be struck out - Companies Act 1965 s. 218 - Rules of the High Court 1980, O. 1 r. 2(2) & O. 18 r. 19*

In 1994, the petitioner and CLC executed an agreement ('the first agreement') with Taraf Dimensi Sdn Bhd ('Taraf') whereby they sold their shares in M company to Taraf for a certain sum. In 1996, the petitioner entered into a Deed of Settlement with KC Foo and one Wijaya ('the second agreement'), and by that KC Foo and Wijaya agreed to assist Taraf to settle the sum payable to the petitioner under the first agreement. The petitioner, KC Foo and Wijaya then entered into a Supplementary Agreement ('the third agreement'), wherefore it was agreed that the RM8 million due to the petitioner under the second agreement would be settled by way of (i) a cash payment of RM5 million; and (ii) the acceptance by the petitioner of six terrace shop offices belonging to, and to be built by the respondent ('the property'). Subsequently, in order to give effect to the third agreement, a sale and purchase agreement was entered into by the petitioner and the respondent ('the sale agreement'). *Inter alia*, the sale agreement stipulated that the respondent would sell the property to the petitioner for RM3 million, to be delivered within 15 months from the date of approval of the relevant building plans. A further stipulation was that the petitioner had a 'sell back' option, by which, within 90 days of the petitioner exercising the option, the respondent was dutybound to pay to the petitioner the purchase price of RM3 million.

The petitioner had exercised the 'sell-back' option and so became entitled to the RM3 million purchase price aforesaid. No such payment was however advanced by the respondent. The petitioner, in the circumstances, presented a petition for the winding up of the respondent on the grounds that the respondent was commercially insolvent and was unable to pay its debts.

The respondent applied to strike out the petition under O. 18 r. 19 Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of the court. Before the learned judge, the respondent argued, *inter alia,* that (i) it was not insolvent; (ii) there was no debt due to the petitioner as the petitioner, by reason particularly of the third agreement, had accepted the property in full settlement of the RM3 million payable; and (iii) since the debt was genuinely disputed, the forum of a winding-up was improper and constituted an abuse of process. It was not in dispute that, at the material time, the respondent owned some assets, including a parcel of land valued at RM159 million.

The petitioner argued that, by virtue of O. 1 r. 2(2) of the RHC, the respondent could not resort to O. 18 r. 19 to strike out a petition under s. 218 of the Companies Act 1965 ('the Act'). That apart, it was also submitted that the first, second and third agreements could not be relied upon by the respondent to substantiate their dispute, as (i) the sale agreement was an independent contract; (ii) the respondent could not vary the terms of the sale agreement, it being prohibited by s. 92 of the Evidence Act 1950; and (iii) estoppel would operate to bind the parties to the terms agreed upon in the sale agreement.

Held:

[1] Order 1 r. 2(2) of the RHC shows that the provisions of O. 18 r. 19 do not apply to a petition under s. 218 of the Act because such a petition is governed by the provisions of the Companies (Winding-up) Rules 1972 which are specific rules made pursuant to s. 372(d) of the Act to regulate the winding up of companies. Unless there is a provision in the 1972 Rules to allow for the application of the RHC, O. 1 r. 2(3) cannot be relied upon to make the RHC apply hereto. Such a petition, however, may still be struck out under the inherent jurisdiction of the court. The residuary or reserve powers possessed by a court is quite separate and distinct from statutory powers of the court.

[2] The respondent was not referring to the first, second and third agreements in an attempt to explain the words or change the meaning of the terms in the sale agreement. The relevant affidavit of the respondent's director did not relate to oral agreements or negotiations as such, but referred to the first, second and third agreements in order to lend credence to the

respondent's arguments. The reference, in other words, was only to provide the factual basis upon which the respondent sought to raise the dispute. Such a reference was therefore caught by *proviso* (a) of s. 92 of the Evidence Act 1950, and it would thus be open to the respondent to rely on the first, second and third agreements to prove their assertions.

[3] The petitioner had only raised the plea of estoppel in submissions and not in the pleadings. Although permitting a litigant to argue an unpleaded estoppel is a matter within the discretion of the judge, the justice of this case requires that it should not be permitted. This was not a case in which the respondent was guilty of an unconscionable or unworthy conduct. There was also no allegation that the respondent had materially benefited from the agreements. Accordingly, for the purpose of determining this application, reference to the first, second and third agreements cannot be excluded.

[4] There was sufficient evidence to show that the debt was genuinely disputed. In particular, the assertion by the respondent that no obligation to pay under the sale agreement arose as the petitioner had accepted the lands in full satisfaction of the RM3 million had been genuinely raised and was not without merit. On the facts, the debt was indeed disputed on substantial grounds.

[5] The petitioner, upon receiving the affidavit of the respondent's director in question, must have become aware that the debt was being seriously disputed by the respondent. To continue to invoke the winding up jurisdiction and prosecute this petition after becoming aware that the debt was seriously disputed constituted an abuse of process.

[6] Taking into account the value of the 106 acres of lands owned by the respondent, it could not be said that the respondent was commercially insolvent. In any case, since there was a bona fide dispute to the debt, any presumption that the respondent was unable to pay its debt, if any, had in effect been rebutted.

[Petition struck out.]

Case(s) referred to:

Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 2 MLJ 423 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Banks [1995] 4 CLJ 283 ***(refd)***

Chai Tse Foh & Anor v. Asia Fishing Industries Pte Ltd [1977] 2 MLJ 195 ***(refd)***

Connelly v. DPP [1964] AC 1254 ***(refd)***

Dato' Ibrahim Hj Ismail v. Onstream Marine Sdn Bhd [1998] 4 CLJ 526 ***(refd)***

Datuk Mohd Sari Datuk Hj Nuar v. Idris Hydraulics [1996] 3 CLJ 877 ***(refd)***

EM Buxton & Anor v. Packerging Specialist Sdn Bhd [1987] 1 MLJ 342 ***(refd)***

Forsayth NL v. Juno Securities Ltd 4 ACSR 281 ***(refd)***
Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd [1988] 1 CLJ 649 ***(refd)***
Lai Kim Loi v. Dato Lai Fook Kim & Anor [1989] 2 CLJ 107 ***(refd)***
Liew Yin Yin Construction Sdn Bhd v. Talam Corporation Bhd ***(refd)***
Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1997] 2 CLJ Supp 571 ***(refd)***
Mann & Anor v. Goldstien & Anor [1968] 2 All ER 768 ***(refd)***
Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58 ***(refd)***
NKM Development Sdn Bhd v. Enex Sdn Bhd [1988] 1 CLJ 65 ***(refd)***
R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***
Re Great Eastern Hotel (Pte) Ltd [1989] 1 MLJ 161 ***(refd)***
Re Lo Siong Fong [1994] 2 MLJ 72 ***(refd)***
Re London & Paris Banking Corp [1874] LR 19 Eq 444 ***(refd)***
Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd [1988] 1 MLJ 84 ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637 ***(refd)***
Tang Chiok Sing v. Lian Fatt Sawmill Co [1976] 2 MLJ 241 ***(refd)***
Union Workshop (Construction) Co v. Ng Chew Ho Consultant Co Sdn Bhd [1978] 2 MLJ 22 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 181, 218(1)(e), (2)(a), 372(d)
Evidence Act 1950, s. 92
Rules of the High Court 1980, O. 1 r. 2(2), (3), O. 18 r. 19(1)(d)

Other source(s) referred to:
Companies Act, Buckley, 13th edn, p 460
Mallal's Digest, 1997 Reissue, 4th edn, vol 3, p 287

For the petitioner - Lee Yen Lyn; M/s Chan & Assocs
For the respondent - V Segaran; M/s Maxwell Kenion Cowdy & Jones

Reported by WA Sharif

JUDGMENT

Clement Skinner JC:

On 15 July 1998 Chong Chee Yan (the petitioner) presented a petition pursuant to s. 218(1)(e) of the Companies Act 1965 (the Act) for the winding-up of the respondent Golden Dragon Garden Sdn. Bhd. (Golden Dragon) on grounds of the latter's inability to pay its debts. In response, Golden Dragon on 20 October 1998 filed an affidavit in opposition as well as an application to strike out the petition under O. 18 r. 19(i)(d) of the Rules of the High Court 1980 (RHC) and under the inherent jurisdiction of the court on grounds that the petition constitutes an abuse of process. This decision relates to the striking out application. The facts giving rise thereto follow.

On 27 March 1997, the petitioner and Golden Dragon entered into a sale and purchase agreement (the sale agreement) whereby Golden Dragon agreed to sell to the petitioner six pieces of lands (collectively the said lands) with six terrace type shop offices constructed thereon (the said shop offices) for the total purchase price of RM3,000,000. By cl. 6 of the sale agreement, Golden Dragon agreed to convey and hand over the said lands and shop offices within fifteen months from date of approval of the building plans of the same, which were to be obtained within five months from the date of the sale agreement.

Clause 13.2 of the sale agreement contains a special condition (the sell back right) which reads as follows:

> the purchaser shall have the irrevocable option exercisable at any time by written notice for a period commencing from the date of this agreement until the date of handing over to the purchaser as provided in Clause 6 above to compel the vendor to purchase the said land from the purchaser at the purchase price provided that all costs and expenses including stamp duty (if any) of such purchase shall be borne solely by the vendor.

By cl. 13.3 of the sale agreement, within 90 days of the petitioner exercising his sell back right, Golden Dragon was obliged to pay to the petitioner the purchase price of RM3,000,000. On 27 May 1997 the petitioner exercised his sell back right and became entitled to be paid RM3 million by 25 August 1997. When no such payment was received, the petitioner, through his solicitors, on 7 January 1998 sent to Golden Dragon a notice pursuant to s. 218(2)(a) of the Act requesting payment within 21 days failing which Golden Dragon will be deemed unable to pay the said RM3 million whereupon appropriate action would be taken to wind-up Golden Dragon.

There being no response from Golden Dragon to the s. 218 notice, this petition was presented.

The petition as presented, appears quite straightforward and narrates the facts stated above. However, it is the contention of Golden Dragon that there is much more to the petition than meets the eye. In support of its application to strike out, one Hasim bin Jahaya, a director of Golden Dragon has affirmed an affidavit dated 17 October 1998 (encl. 11) (Hasim's affidavit) where in paras. 5 to 10 thereof he sets out background facts leading up to the signing of the sale agreement. Facts which are not referred to in the petition or the affidavit of the petitioner affirmed in support thereof.

Background To The Sale Agreement

In 1994, the petitioner together with one Chong Lai Choong (CLC) were shareholders in a company known as Mesapol Properties Sdn. Bhd. to the extent of 4,945,992 shares (the Mesapol shares). On 31 October 1994, they entered into an agreement (the 1st agreement) to sell the Mesapol shares to a company called Taraf Dimensi Sdn. Bhd. (Taraf) for RM38,250.000. Of this sum Taraf paid RM2 million leaving a sum of RM36,250,000 still payable.

On 15 July 1996, a deed of settlement (the 2nd agreement) was entered into between the petitioner, one Foo Kum Cheun (K.C. Foo) and Wijaya Astana Sdn. Bhd. (Wijaya) whereby K.C. Foo and Wijaya agreed to assist Taraf to settle the RM36,250,000 due under the 1st agreement to the petitioner in the following manner:

(i) RM10 million payable in cash by five equal payments of RM2 million each commencing from 15 July 1996 and thereafter on the 15th day of each following month;

(ii) RM10 million by way of transfer and conveyance to the petitioner of 1 unit of fully completed eight storey building in Ipoh,

(iii) RM16,250,000 by way of transfer and or allotment to the petitioner of 16,250,000 ordinary shares in a joint venture company to be set up by K.C. Foo in Papua New Guinea.

Of the cash payment of RM10 million mentioned in (i) above, RM2 million was paid leaving a balance of RM8 million payable (hereafter the said RM8 million).

On 27 March 1997, the petitioner, K.C. Foo and Wijaya entered into a supplementary agreement (the 3rd agreement) whereby it was agreed that the said RM8 million under the 2nd agreement would be settled through a cash payment of RM5 million and the acceptance by the petitioner of six terrace shop offices built on six lots of land belonging to Golden Dragon in lieu of RM3 million. It was to give effect to the 3rd agreement that the sale agreement was entered into. The petitioner has lodged caveats against the said lands in November 1996 and December 1997 to protect his interest therein. On 3 October 1998, the petitioner consented to Golden Dragon applying to the High Court to remove the above caveats, so as to allow the master title within which the said lands are contained to be surrendered for subdivision and realienation, on condition the petitioner's caveats be relodged on the relevant subdivided titles on their issuance.

Golden Dragon contends that the presentation of the petition constitutes an abuse of process in that:

(a) Golden Dragon genuinely disputes the debt on several substantial grounds;

(b) the forum of a winding-up court is not to be used to secure a disputed debt and to persist with a petition instead of turning to the civil courts constitutes abuse of process;

(c) the petition was presented for the purpose of putting pressure on Golden Dragon to settle the alleged debt;

(d) Golden Dragon is not insolvent. It is a going concern, undertaking a huge development known as the Bandar Pulai project in Ipoh. Its assets exceeds its liabilities and the company is well able to settle its debts.

Applicability Of O. 18 r. 19 RHC To s. 218 Companies Winding-up Petition

Before considering the merits of the application, I must deal with a submission by Ms Lee Yen Lyn, learned counsel for the petitioner, that Golden Dragon cannot have resort to O. 18 r. 19 RHC to strike out a petition presented under s. 218 of the Companies Act because O. 1 r. 2(2) RHC makes this clear. Counsel however concedes that the court can invoke its inherent jurisdiction to strike out for abuse in appropriate cases. In support, counsel relies on *Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Another* [1997] 2 CLJ Supp 571; [1997] 4 MLJ 192.

Mr V. Segaran, learned counsel for Golden Dragon, referred to the following cases where the court, acting under O. 18 r. 19 RHC has struck out winding-up petitions. In *Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd.* Zakaria Yatim J (as he then was) acted under O. 18 r. 19 RHC to strike out a s. 218 petition. A reading of the decision shows however that no argument was addressed to the learned judge on whether the RHC was applicable to a companies winding-up petition. In *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd* [1989] 2 MLJ 423, LC Vohrah J, in holding that O. 18 r. 19(3) specifically provides that the rule applies to a petition which must include a winding-up petition, relied on the case on *NKM Development Sdn Bhd v. Enex Sdn Bhd* [1988] 1 CLJ 65 where VC George J (as he then was) struck out a s. 218 petition under O. 18 r. 19 RHC. It should however be noted that in the later case of *Re Lo Siong Fong* [1994] 2 MLJ 72, VC George J observed *per curiam*, that O. 18 r. 19 RHC had no application to a s. 218 petition. More recently, in *Dato' Ibrahim bin Hj Ismail v. Onstream Marine Sdn Bhd* [1998] 4 CLJ 526; [1998] 4 MLJ 87, Haidar J (as he then was) in striking out a s. 218 petition under the inherent jurisdiction expressed reservations on the view of VC George J in *Re Lo Siong Fong (supra)* that O. 18 r. 19 RHC has no application to a s. 218 petition.

In my judgment, a plain reading of O. 1 r. 2(2) RHC 1980 shows that the provisions of O. 18 r. 19 RHC have no application to a petition presented under s. 218 of the Act because such a petition is governed by the provisions of the Companies (Winding-up) Rules 1972 (the 1972 Rules) which are specific rules made pursuant to s. 372(d) of the Companies Act 1965 to regulate the winding-up of companies. In so far as the provisions of O. 1 r. 2(3) is concerned, I agree with the reasons and the way in which Kamalanathan Ratnam JC (as he then was) in the *Lyn Country Sdn Bhd* case has interpreted the same, which is, unless there is a provision in the 1972 Rules to allow for the application of the RHC 1980, O. 1 r. 2(3) cannot be relied upon to make the RHC apply thereto.

I also note that in his decision, the learned JC (as he then was) felt bound by the case of *Lai Kim Loi v. Dato Lai Fook Kim & Another* [1989] 2 CLJ 107; [1989] 2 MLJ 290 where the then Supreme Court, in discussing whether a petitioner who presents a winding-up petition pursuant to s. 218 of the Act could 'roll up' and present in the same petition a plea of oppression under s. 181 of the Act, held that the procedure to be adopted on a petition presented pursuant to s. 218 of the Act, are governed by the Companies (Winding-up) Rules 1972. I too am bound by such decision.

Nothing turns on the above finding however as counsel for the petitioner concedes that this petition may still be struck out under the inherent jurisdiction of this court if a case is made out for so doing. As far as the powers exercised by this court under such jurisdiction is concerned, I identify that power as being that "residuary or reserve powers possessed by a court quite separate and distinct from statutory powers of the court" as stated and explained by the Federal Court in the case of *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, and described in the case of *Connelly v. DPP* [1964] AC 1254 as "powers enjoyed by a court in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process."

Golden Dragon's Submissions

Golden Dragon contends that no debt is due to the petitioner because:

(a) the petitioner has accepted the said lands and shop offices to be constructed thereon in full settlement of the RM3 million payable. There is therefore no debt due. There has been an accord and satisfaction. The act of the petitioner lodging caveats on the said lands and thereafter taking positive steps to maintain these caveats in position as recently as October 1998 all go towards showing that the petitioner has in fact accepted the said lands in full satisfaction of the RM3 million. Counsel relying on *EM*

Buxton & Anor v. Packerging Specialist Sdn Bhd [1987] 1 MLJ 342 points out that only persons claiming an interest in land can in law lodge a caveat, a monetary claim cannot create an interest capable of protection by caveat. The petitioner has therefore by his action shown positively and unequivocally that he has taken land in satisfaction of the RM3 million. The petitioner cannot at the same time maintain this petition on the basis that RM3 million is still due to him. This clearly amounts to an abuse of process;

(b) the sale agreement is unenforceable. The 1st agreement clearly imposes on Taraf legal obligations towards the petitioner. However, there has been no assignment or novation between the petitioner, Taraf and Golden Dragon so as to saddle Golden Dragon with the obligation to pay for the Mesapol shares. Counsel refers to the case of *Liew Yin Yin Construction Sdn Bhd v. Talam Corporation Bhd. Mallal's Digest* 4th edn, vol 3 [1997] Re-issue at 287 and submits the facts there are not unlike the present case;

(c) taking into account the history of the alleged debt and the 1st, 2nd and 3rd agreements, there is clearly no consideration for entering into the sale agreement. At its highest, the obligation of Golden Dragon may be described as to assist in the settlement of monies due to the petitioner. In fact counsel goes a step further to say that the sale agreement relates to matters agreed upon between the petitioner and Taraf sometime in 1994 and any consideration if it exists, must constitute past consideration.

Petitioner's Submission

In response to the above, the petitioner argues that it is not just any dispute, no matter how genuinely or honestly raised, that would entitle Golden Dragon to the relief it seeks. It must be shown that there is a genuine dispute on substantial grounds. In support the Australian case of *Forsayth NL v. Juno Securities Ltd* 4 ACSR 281 is cited.

There cannot be any *bona fide* dispute on substantial grounds says counsel, because the validity or enforceability of the sale agreement has never been questioned before. It was entered into voluntarily and freely, with each party acting through solicitors. Nor has there been any dispute about the entry of the caveats on the said lands. When the petitioner exercised his sell back right under cl. 13.2 of the sale agreement, and sent the notice requesting payment of RM3 million, there was no dispute on it, no indication or response from Golden Dragon that the obligation to pay RM3 million was being questioned or disputed. There was total silence. After service of the s. 218 notice there was still no indication of any dispute. Even after the petition had been presented and served and as late as 3 October 1998 when the consent order was made on the caveats, there was still no indication from Golden Dragon that the validity and enforceability of the sale agreement was being disputed.

Counsel for the petitioner states that the 1st, 2nd and 3rd agreements cannot be relied upon by Golden Dragon to substantiate their alleged dispute for three reasons:

(a) the sale agreement is an independent contract. There is nothing in it to indicate that it is connected to any other previous agreement. The parties are therefore confined to the four corners of the sale agreement in determining what they have agreed to. In support, counsel cites *Chai Tse Foh & Anor v. Asia Fishing Industries Pte. Ltd* [1977] 2 MLJ 195 p 117;

(b) reference to the 1st, 2nd and 3rd agreements is prohibited by s. 92 Evidence Act. The oral statements embodied in paras. 5 to 10 of Hasim's affidavit seek to introduce oral evidence to vary, add to, or contradict the terms of the sale agreement but the terms of the sale agreement which are themselves clear and so there can be no resort to other documents to give another meaning to them. Counsel cites in support *Union Workshop (Construction) Co. v. Ng Chew Ho Consultant Co. Sdn. Bhd.* [1978] 2 MLJ 22 p. 23;

(c) it is unconscionable and inequitable for Golden Dragon to evade its responsibilities and obligations under the sale agreement. Estoppel will operate to bind the parties to the terms they have settled upon in the sale agreement. In support, counsel cites *Tang Chiok Sing v. Lian Fatt Sawmill Co.* [1976] 2 MLJ 241 and *Boustead Trading (1985) Sdn. Bhd. v. Arab Malaysian Merchant Banks* [1995] 4 CLJ 283; [1995] 3 MLJ 331.

It There A Bona fide Dispute On Substantial Grounds?

Having considered the submissions as well as the authorities cited, the issue that calls for determination is whether Golden Dragon has raised a *bona fide* dispute on substantial grounds.

In *Ng Ah Kway v. Tai Kit Enterprise Sdn. Bhd.* [1986] 1 MLJ 58, Shankar J (as he then was) in considering a petition presented persuant to s. 218 of the Act, stated at p. 65, "whether there is a *bona fide* dispute is an issue of fact to be decided on the evidence before the court".

The evidence before me has been provided by way of affidavits. To Hasim's affidavit is exhibited the 1st, 2nd and 3rd agreements, and paras 5 to 10 of his affidavit explains the circumstances leading to the execution of all the agreements, including the sale agreement. The petitioner in an affidavit in reply affirmed on 31 October 1998 (encl. 14) admits paras. 5 to 9 of Hasim's affidavit but denies that the sale agreement is unenforceable, or that there is no debt due or that there is no consideration for entering into the said agreement.

Golden Dragon seeks reliance upon the 1st, 2nd and 3rd agreements but the petitioner says this court should not look at them for the reasons already given. I regret I cannot agree with those reasons. As regards the first objection, namely, the parties are confined to the four corners of the sale agreement, I do not think Golden Dragon refers to the 1st, 2nd, and 3rd agreements in an attempt to explain the words or change the meaning of the terms in the sale agreement. To me, Golden Dragon points to the existence of and relies upon facts stated in the 1st, 2nd 3rd agreements to lend credence to their arguments and to demonstrate that the matters they raise in dispute are of substance and have merit. The case of *Chai Tse Foh & Anor v. Asia Fishing Industry Pte. Ltd. (supra)* relied upon by the petitioner can be distinguished. In that case, the defendants who had been restrained from disposing of prawns from a factory entered into a contract on FOB term to do so two days before the order. However, deliveries of the prawns were to take place on dates thereafter. To avoid contempt proceedings the defendants were driven to contend that despite its appearance in the contract, the words F.O.B. were surplusage and without meaning because property in the prawns had passed on the day the contract was signed although delivery took place on several occasions after the restraint order. It was in those circumstances that the then Federal Court held that "there is nothing within the four corners of the agreement to indicate that the sale was of specific goods or that the words FOB were surplasage. They must be given their full meaning and effect. The proof of this lies in the document itself". As I earlier stated, Golden Dragon's reference to the 1st, 2nd and 3rd agreement is not to show that any words or terms in the sale agreement mean something else.

With regard to the second objection based on s. 92 of the Evidence Act, I do not find that Golden Dragon is trying to adduce oral evidence to vary, add to, or contradict the terms of the sale agreement. The averments in Hasim's affidavit do not relate to oral agreements or negotiations or such. They refer to written contractual documents namely the 1st, 2nd and 3rd agreements, the entering into of which is not denied by the petitioner. They provide the factual basis upon which the dispute is raised. In any event, I find that the reference to the 1st, 2nd and 3rd agreements come within proviso (a) of s. 92, which states that "any fact may be proved which would invalidate any document ... such as ... want or failure of consideration ..." Now, one of the pegs on which Golden Dragon hangs its dispute is want of consideration or alternatively past consideration. Another peg is the lack of any assignment or novation so as to legally oblige Golden Dragon to perform the obligations of Taraf. In my opinion, pursuant to proviso (a) of s. 92 it would be open to Golden Dragon to prove their assertions through reliance on the 1st, 2nd and 3rd agreement. I do not think the case of *Union Workshop (Construction) Co. Sdn. Bhd.* [1978] 2 MLJ 22 p. 23 is helpful to the petitioner's submissions. That case

concerned the meaning to be given to a subcontract document which clearly stated that the subcontractor was to be paid for the gross weight of steel used in the supply of frames. It was sought to introduce evidence of the method of payment in the main contract to contradict the method stated in the sub-contract. This was disallowed under s. 92 because the subcontract was not silent on the method of payment and therefore another document could not be resorted to give another meaning to the subcontract. This is clearly not the case in this application.

As regards estoppel, I find that the plea has been raised in submissions by counsel when the material facts entitling the petitioner to make such submission have not been stated either in the petition or in the affidavits affirmed by the petitioner. In the case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank* [1995] 4 CLJ 283; [1995] 3 MLJ 331, even though estoppel was not pleaded, the material facts giving rise to the estoppel were sufficiently pleaded without actually using the term 'estoppel'. Furthermore considerable evidence on the point was led at the trial without objection. This is not the case here. It was also held in *Boustead's* case that a court may permit a litigant to argue an unpleaded estoppel if it is in the interests of justice to do so. It is a matter within the discretion of the judge who must have due regard to all the circumstances of the case and that such departure should rarely be permitted. I have given consideration whether I should allow this unpleaded estoppel to be argued and I have decided I should not because the justice of this case does not require it. This is not a case in which I have detected unconsionable and unworthy conduct by Golden Dragon. There is no allegation that Golden Dragon has materially benefited from any of the agreements. In fact it is Golden Dragon's case that it has been saddled with Taraf's debt. Golden Dragon is raising what it believes to be genuine disputes on the sale agreement. I do not regard this as unconsionable conduct in the particular circumstances of this case.

I accordingly hold that reference to the 1st, 2nd and 3rd agreement are not to be excluded for the purpose of determining this application. I am satisfied that there is sufficient evidence before me to show that the debt is genuinely disputed. The agreements when read together show that the original debt is really that of Taraf. Part of that debt, to the extent of RM3 million, has devolved upon Golden Dragon, not directly from Taraf but through K.C. Foo and Wijaya. In fact the debt devolves by virtue of the 3rd agreement. The sale agreement was entered into to give effect to the 3rd agreement to which Golden Dragon is not a party. No assignment or novation has been entered into between the petitioner, Taraf and Golden Dragon in respect of the original debt. On what basis then was the sale agreement entered into and for what consideration? Notwithstanding that cl. 2 of the sale agreement states that RM3 million has been paid to Golden Dragon, a reading of cl. 2 of the 3rd

agreement suggests that no such payment was made because K.C. Foo and Wijaya undertook to cause Golden Dragon to issue receipts to the petitioner for the RM3 million.

With regard to the claim by Golden Dragon that no obligation to pay under cl. 13.3 of the sale agreement arises as the petitioner has accepted the said lands in full satisfaction of the RM3 million, I find that this assertion has been genuinely raised and not without basis. Counsel for Golden Dragon that contends what cl. 13.2 gives to the petitioner is a right to 'compel' Golden Dragon to purchase back the said lands. It is only when Golden Dragon has been so compelled that the right to be paid RM3 million arises. However, contends counsel, when the petitioner lodged caveats over the said lands and then took further steps to maintain them in position, the petitioner has unequivocally shown that he has accepted the said lands in full satisfaction of the RM3 million wherefore no sell back right can arise under cl. 13.2. In fact it is the submission of counsel that to compel Golden Dragon to purchase back the said lands the petitioner should have brought a civil action instead of a winding-up petition as a means to enforce payment. This amounts to an abuse of process.

In the circumstances, I am satisfied on a balance of probabilities that the debt is disputed on substantial grounds. The matters raised go to the very foundation of the petition and if established would afford Golden Dragon a complete answer to the demand of the petitioner. Learned counsel for the petitioner has stressed that there cannot be any substance to the matters raised in dispute because there was no earlier indication whatsoever of the matters now raised. But, as pointed out by counsel for Golden Dragon, silence on their part does not mean they do not genuinely dispute the debt. To me, the fact that the matters in dispute were not raised earlier will not deprive them of the weight they deserve if they are well founded. In this case they are.

As far as the law is concerned, it has been held that where a petition in based on a debt which is disputed on substantial grounds, the petitioner is not a creditor. If the petitioner is not a creditor, he is not entitled to present a petition or apply for a winding-up order. He has no *locus standi* and the petition must fail (see *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd.* [1988] 1 CLJ 649; [1988] 3 MLJ 49). Similarly, a petition for winding-up cannot be resorted to secure a disputed debt. The proper course for the petitioner is to file a civil suit for determining the disputed claims (see *Ng Ah Kway v. Tai Kit Enterprise Sdn. Bhd.* [1986] 1 MLJ 58)

Keeping in mind what is stated above, I find that the petitioner must have become aware that the debt was being seriously disputed when he received Hasim's affidavit of 17 October 1998. To continue to invoke the winding-up jurisdiction and prosecute this petition after becoming aware that the debt is

seriously disputed constitutes an abuse of process. (see *Mann & Anor v. Goldstien & Anor* [1968] 2 All ER 768). It follows that as the petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor and he has no *locus standi* to continue to maintain this petition. A winding-up court is not the proper forum to determine a disputed debt. A civil suit should be instituted for that purpose. Until then, to continue to maintain this petition constitutes an abuse of process. This petition must accordingly be struck out.

Golden Dragon's Inability To Pay Its Debts

The presumption of inability to pay a debt only arises if there has been neglect to pay the sum demanded (see s. 218(2)(a) of the Act). However, if the debt is disputed on *bona fide* grounds then there is no neglect to pay and the presumption is in effect rebutted (see *Re London and Paris Banking Corp* [1874] LR 19 Eq 444 p. 446). Since I have found that there is a *bona fide* dispute on substantial grounds, any presumption that Golden Dragon is unable to pay its debts has in effect been rebutted. However, in case I am wrong in my finding, I now consider whether Golden Dragon is insolvent. In this regard reference should first be had to the case of *Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd.* [1992] 1 MLJ 313 where in dealing with a petition presented under s. 218(2)(a) of the Act, the then Supreme Court per Gunn Chit Tuan SCJ at p. 320 stated that:

> The presumption of insolvency arises when the requirements of s. 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts.

The position then is that where the presumption of insolvency arises, the onus shifts upon the company to prove it is able to pay its debt. The presumption is a rebuttable one. In the case of *Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd* [1988] 1 MLJ 84, VC George J (as he then was) in considering a petition presented under s. 218(2)(a) of the Act at p. 84 stated that:

> It is to be noted that it is not the neglect to meet the demand of the creditor that gives the jurisdiction to the court to order that the company be wound-up but the inability of the company to pay its debts. It is the presumption arising from the neglect to meet the demand that gives the court the jurisdiction. This presumption is rebuttable.

Golden Dragon strenuously denies that it is unable to pay its debts and paras. 17 to 21 of Hasim's affidavit is devoted to providing evidence of its solvency. Counsel for Golden Dragon has referred to two tests which may be adopted by the court to determine solvency. One is the 'quick assets test' where the court looks at the current assets against the current liabilities to ascertain

whether there is a deficiency (see *Re Great Eastern Hotel (Pte) Ltd.* [1989] 1 MLJ 161 where the test is discussed at length). The other is the 'overall assets and liabilities test' where the court looks at all the assets of a company against all its liabilities to determine its ability. (see *Datuk Mohd. Sari b. Datuk Hj. Nuar v. Idris Hydraulics* [1996] 3 CLJ 877; [1997] 5 MLJ 377). Counsel contends that whichever test is employed, it will be seen that Golden Dragon is well able to pay its debts.

It is not in dispute that Golden Dragon is a going concern, undertaking a large development in Ipoh known as the Bandar Pulai Project on 106 acres of land, complete with commercial, social and recreational facilities. Paragraph 17 to 19 of Hasim's affidavit shows that Golden Dragon has substantial assets and its lands in Bandar Pulai, Ipoh are valued at RM149,500,000 by valuers, Azmi & Co. To Hasim's affidavit are also annexed the audited accounts of Golden Dragon as at 31 December 1997. Adopting the 'overall assets and liabilities test', so submits counsel, it will be seen that by para. 18 of Hasim's affidavit total assets of Golden Dragon as at 31 December 1997 stands at RM119,320,968 whilst total liabilities stand at RM91,382,180. This shows that Golden Dragon is commercially solvent. Adopting the 'quick assets test', this shows its current assets at RM81,832,531 and its current liabilities as RM81,458,780 thus showing a surplus of RM343,757. There is no deficiency and so the company is well able to pay its debts. However counsel for the petitioner submits that this amount is inadequate to meet the petitioners demand of RM3 million and therefore Golden Dragon is insolvent in the commercial sense. Counsel then referred to *Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd. (supra)* where the then Supreme Court in referring to the 'commercial insolvency' of a company approved and applied the following observations from Buckley on *Companies Act* (13th edn.) at p. 460:

> In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound: this not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investment not presently realizable, but although this be so, yet if it has not assets available to meet its current liabilities it is commercially insolvent and may be wound-up.

In the present case, Golden Dragon is the owner of 106 acres of land at Pulai, Ipoh. Learned counsel for Golden Dragon points out that in the audited accounts, the value of these lands are stated at RM17,235,194 under the item "Property Development Projects" when in reality their value is RM149,500,000 as reflected in Azmi & Co's valuation report. This would mean of course that Golden Dragon is not commercially insolvent. I find there is merit in what counsel submits. The passage in Buckley quoted above speaks of "assets available" without reference to the treatment of their value. If the court is

presented with evidence of a valuation report showing the lands to be valued at an amount exceeding the figures in the accounts, and no challenge is made as to the availability of these lands to meet current liabilities, I do not think I should ignore such evidence but look at it as being relevant to the issue before the court. In the circumstances, I find that taking into account the value of the lands at RM159,000,000 it cannot be said that Golden Dragon is commercially insolvent. Thus by whichever of the two tests employed, I hold that Golden Dragon is not insolvent.

I am satisfied that the company has placed sufficient evidence before the court to rebut the presumption of its inability to pay its debts.

In the result, I allow the application and strike out this petition with costs.